Sub-Buch

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UNITED STATES TAX COURT

WASHINGTON, DC 20217

MICHAEL NICHOLAS PALM,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 12141-10L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

ORDER

Pursuant to Rule 152(b), Tax Court Rules of Practice and Procedure, it is

ORDERED that the Clerk of the Court shall transmit with this order to both petitioner and respondent a copy of the pages of the transcript of the trial in this case that contain the oral findings of fact and opinion that was rendered at the trial session at St. Paul, Minnesota.

In accordance with the oral findings of fact and opinion, a decision will be entered for respondent

(Signed) Ronald L. Buch
Judge

Dated: Washington, D.C.
May 17, 2013

SERVED MAY 20 2013

Bench Opinion by Judge Ronald L. Buch
April 25, 2013
Michael Nicholas Palm v. Commissioner
Docket No. 12141-10L

THE COURT: The Court has decided to render oral findings of fact and opinion in this case, and the following represents the court's oral findings of fact and opinion. The oral findings of fact and opinion may not be relied upon as precedent in any other case. This opinion is in conformity with Internal Revenue Code section 7459(b) and rule 152(a) of the Tax Court Rules of Practice and Procedure. Any section references that follow refer to the Internal Revenue Code in effect during the years at issue, and rule references are to the Tax Court Rules of Practice and Procedure.

Background

On July 1, 2009, the IRS issued a Letter 1153 to Mr. Palm proposing to assess a trust fund recovery penalty against him for the failure to collect, account for, and pay over withheld taxes for Albert Lea Hospitality of Minnesota, LLC. With the letter, the IRS also sent Form 2751, Proposed

Assessment of Trust Fund Recovery Penalty, listing the total proposed penalty of $126,948.05. The Letter 1153 stated: "If we do not hear from you within 60 days from the date of this letter (or 75 days if this letter is addressed to you outside the United States), we will assess the penalty and begin collection action." Mr. Palm did not timely dispute the proposed assessment, and on December 14, 2009, the IRS assessed a trust fund recovery penalty for the periods ending March 2007, June 2007, September 2007, December 2007, March 2008, June 2008, December 2008, and March 2009.

On January 15, 2010, the IRS sent Mr. Palm a Notice of Intent to Levy and Notice of Your Right to a Hearing. That notice included a list of the trust fund recovery penalties assessed against him for each quarter listed above and the total due by January 25, 2010 of $127,533.67. Mr. Palm timely submitted a Form 12153, Request for a Collection Due Process or Equivalent Hearing. On the Form 12153, he requested an offer-in-compromise and stated "I do not owe the taxes as others were responsible for the collection and processing of the payroll taxes and payment." On March 10, 2010, the IRS issued a letter to Mr. Palm acknowledging receipt of his Form 12153, scheduling a hearing by telephone on April 6, 2010. The IRS also requested the following: Mr. Palm's signed Federal income tax returns for 2007 and 2008, proof of estimated tax payments for 2009, a completed Form 433-A or Form 433-B, and bank records from September 2009 through February 2010. After Mr. Palm failed to call on April 6th, the settlement officer sent Mr. Palm a letter, giving him an additional 14 days within which to provide any information he would like the settlement officer to consider before making a determination.

On April 14, 2010, the settlement officer received a letter from Mr. Palm, a Form 433-A, and bank statements. Mr. Palm stated in his letter that he received the Letter 1153 but did not understand it to be a final determination regarding the trust fund recovery penalty, and he requested the right to dispute the underlying liability with the settlement officer. On the Form 433-A, Mr. Palm listed his monthly income as $1,000 and his monthly expenses of $9,900. The settlement officer determined the allowable expenses based on national and local standards for the size of petitioner's family to be $5,514. In reviewing the bank statements, the settlement officer was unable to locate any entry corresponding to petitioner's alleged housing and utilities costs of $4,500. Additionally, Mr. Palm indicated on those statements that all deposits were loans from his father, totaling approximately $13,000 per month. The settlement officer stated in his notes that IRS records show that Mr. Palm owned a vehicle that he did not disclose on the Form 433-A, that he made $125,000 in cash deposits in 2008, and that he was issued Schedules K-1, Partner's Share of Income, Deductions, Credits, etc., for 2007 and 2008 but he did not list the business in his submission. Thus, there were various inconsistencies in the documents provided to the settlement officer that were not addressed by Mr. Palm's letter of April 14, 2010.

On April 27, 2010, the IRS issued a Notice of Determination to Mr. Palm sustaining the proposed levy. Mr. Palm timely filed a petition disputing the notice of determination. In the time that this case has been pending, there have been two prior hearings and several continuances. While this case has been pending, Mr. Palm had the opportunity to challenge the underlying liability and to present an offer in compromise. Regarding the underlying liability, Mr. Palm made a partial payment of tax and filed with the

IRS a Form 843, Claim for Refund and Request for Abatement. On November 29, 2011, the IRS disallowed Mr. Palm's claim because he was a responsible party. That letter also informed Mr. Palm that he has two years from the mailing date of that letter to sue for refund in district court or the Court of Federal Claims.

Also during those continuances, Mr. Palm learned that Brian Nelson had been in contact with the IRS in connection with the trust fund liability penalty. Mr. Palm directed the Court to places in the administrative record where it shows that the IRS conferred with Mr. Nelson, the record also noting that he was not a section 7602 third-party contact.

The Court digresses here to address this issue. The IRS apparently received information from Mr. Nelson in connection with the examination of the entity that should have remitted the trust fund taxes, as the caption to Exhibit E to Mr. Zoss's declaration indicates. Because it was not a contact with respect to an examination of Mr. Palm, it is not clear that Mr. Palm has a standing to object to this contact. In any event, the record indicates, both expressly and by context, that the contacts with Mr. Nelson were not section 7602 third-party contacts.

Section 7602(c)(3) provides exceptions to the third-party contact rule. Those exceptions include any contact that the taxpayer has authorized. The entries on the ICS History transcript indicate that Mr. Nelson was authorized to contact the IRS in connection with the examination of the Albert Lea entity.

Summary Judgment

Either party may move for summary judgment regarding all or any part of the legal issues in controversy. See Rule 121(a), Tax Court Rules of Practice and Procedure. The Court may grant summary judgment only if there are no genuine issues of material fact. See Naftel v. Commissioner, 85 T.C. 527, 529 (1985). The moving party bears the burden of proving that no genuine issue exists as to any material fact and further that the moving party is entitled to judgment as a matter of law. See Sunstrand Corp. v. Commissioner, 98 T.C. 518, 520(1992), aff'd, 17 F.3d 965 (7th Cir. 1994). In deciding whether to grant summary judgment, the factual materials and the inferences drawn from them must be considered in the light most favorable to the non-moving party. See FPL Group, Inc. v. Commissioner, 115 T.C. 554, 559 (2000); Bond v. Commissioner, 100 T.C. 32, 36 (1993); Naftel v. Commissioner, 85 T.C. at 529. When a motion for summary judgment is made and properly supported, the non-moving party may not rest on mere allegations or denials, but must set forth specific facts showing that there is a genuine dispute for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Sunstrand Corp. v. Commissioner, 98 T.C. at 520; see also Rule 121(d).

Underlying liability

Where the underlying tax liability is properly at issue, we review the Commissioner's determination de novo; where the validity of the underlying tax liability is not properly at issue, we review the Commissioner's administrative determination for abuse of discretion. Sego v. Commissioner, 114 T.C. 604, 610 (2000); Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). If raised at a hearing by the taxpayer, a taxpayer's underlying liability is properly at issue if the taxpayer did not receive a notice of deficiency for the liability or otherwise have an opportunity to dispute that tax liability. See sec. 6330(c)(2)(B).

Mr. Palm's underlying liability is for a trust fund recovery penalty arising under section 6672, sometimes referred to as a "responsible person penalty." The penalty arises when a responsible person fails to collect, account for, and pay over income and employment taxes of employees. The IRS determined that Mr. Palm is a "responsible person" under section 6671(b), which defines "person" for this purpose to include "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." Sec. 6671(b). The Court of Appeals for the Eighth Circuit, to which this case is appealable, has stated that a "responsible person is someone who has the status, duty and authority to avoid the corporation's default in collection or payment of the taxes." See Kenagy v. United States, 942 F.2d 459, 464 (8th Cir. 1991), see also, Moore v. United States, 648 F.3d 634, 637 (8th Cir. 2011). Further, more than one person can be considered a responsible person and because it is not necessary that a responsible person be an actual disbursing officer, delegating the responsibility or authority to another does not relieve him of liability. See Oppliger v. United States, 637 F.3d 889, 893 (8th Cir. 2011), cert. denied, 132 S.Ct. 526 (2011); see also, Keller v. United States, 46 F.3d 851, 854 (8th Cir. 1995), cert. denied, 516 U.S. 824 (1995). So the fact one person might be a responsible person does not affect whether anyone else might also be a responsible person.

Mr. Palm claims he did not have a prior opportunity to dispute the trust fund recovery penalty because the Letter 1153 was only a proposal and did not inform him that the decision was final. In the declaration filed with the motion for summary judgment, respondent provided a copy of the Letter 1153 and a copy of the certified mail return receipt. Mr. Palm admitted that he received the Letter 1153 but he did not understand it to be a final decision regarding the penalty. The Letter 1153 Mr. Palm received states "To preserve your appeal rights you need to mail us your written appeal within 60 days from the date of this letter (75 days if this letter is addressed to you outside the United States)." It goes on to state "You may appeal your case to the local Appeals Office. Send your written appeal to the attention of the Person to Contact at the address shown at the top of this letter." Thus, Mr. Palm was offered a conference with Appeals. It was during the conference with Appeals that petitioner could have disputed that he was a responsible person. As a result of Mr. Palm's failure to timely appeal the proposed assessment, he was not entitled to dispute his liability for the trust fund recovery penalty during his collection due process hearing or before this Court. See sec. 6330(c)(2)(B); Lewis v. Commissioner, 128 T.C. 48, 60-61 (2007); Perrin v. Commissioner, T.C. Memo.2012-22; sec. 301.6320-1(e)(3), Q & A-E2, Proced. & Admin. Regs. Thus, we review the notice of determination for abuse of discretion. See Sego v. Commissioner, 114 T.C. at 610; Goza v. Commissioner, 114 T.C. at 181-182. Although not relevant to the outcome of this proceeding, it is also worth noting that this case has been continued several times to allow Mr. Palm the opportunity to pay a portion of the penalty, file a claim for refund, and to present his position to Appeals. In short, he has had an opportunity for a conference with Appeals.

A petitioner may prove an abuse of discretion by showing that respondent exercised his discretion arbitrarily, capriciously, or without sound basis in law or fact. See Giamelli v. Commissioner, 129 T.C. 107, 111 (2007) As the Court understands it, Mr. Palm claims that the IRS did not provide him with adequate documentation showing how it determined that he was a responsible person. He further claims that IRS personnel continued to speak with his business partner and his business partner's representative, Mr. Nelson, during the investigation of responsible parties; and moreover, that he was not kept informed of any of those communications. Mr. Palm has not asserted any error with respect to the collection considerations or the opportunity for a collection due process hearing.

Nor could he. Collection due process hearings are informal proceedings that may be conducted by telephone or correspondence. See sec. 301.6330-1(d)(2), Q & A-D6, Proced. & Admin. Regs.; see also, Katz v. Commissioner, 115 T.C. 329, 337-338 (2000). Once a taxpayer has been given a reasonable opportunity for a hearing but has failed to avail himself of the opportunity, the settlement officer may proceed in making a determination by reviewing the case file. See Oropeza v. Commissioner, T.C. Memo. 2008-94, aff'd, 402 Fed. Appx. 221 (9th

Cir.2010); Taylor v. Commissioner, T.C. Memo. 2004-25, aff'd, 130 Fed. Appx. 934 (9th Cir.2005); sec. 301.6330-1(d)(2), Q & A-D7, Proced. & Admin. Regs. Mr. Palm did not call for the scheduled conference call but did later provide some of the requested documents the settlement officer requested. Thus, Mr. Palm had an opportunity for a hearing and the settlement officer did not abuse his discretion by reviewing the documents that Mr. Palm included with his April 14, 2010 letter and those in his file in making the determination. See Taylor v. Commissioner, T.C. Memo. 2004-25, aff'd, 130 Fed. Appx. 934 (9th Cir.2005).

Collection Alternatives

A taxpayer may raise collection alternatives that may include an installment agreement or an offer in compromise. Secs. 6320(c), 6330(c)(2)(A)(iii). An offer in compromise of a liability is authorized under section 7122(a). Taxpayers who wish to make an offer in compromise must submit a Form 656, Offer in Compromise. See Godwin v. Commissioner, T.C. Memo. 2003-289, aff'd, 132 Fed. Appx. 785 (11th Cir. 2005). The Court has held that there is no abuse of discretion when Appeals fails to consider an offer in compromise when a Form 656 was not filed with Appeals. See Pough v. Commissioner, 135 T.C. 344, 352 (2010); Kendricks v. Commissioner, 124 T.C. 69, 79 (2005). Mr. Palm did not submit a Form 656, thus there was no abuse of discretion in failing to consider an offer in compromise. Mr. Palm did not request or propose any other collection alternative. The determination of the Office of Appeals must take into consideration: (1) the verification that the requirements of applicable law and administrative procedure have been met; (2) issues raised by the taxpayer; and (3) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection be no more intrusive than necessary. Secs. 6320(c), 6330(c)(3); see also, Lunsford v. Commissioner, 117 T.C. 183, 184 (2001). The settlement officer properly based the determination on the factors required by section 6330(c)(3).

We note again that the Court has allowed a significant delay in collection to afford Mr. Palm the opportunity to address the underlying liability with the IRS and to request an offer in compromise.

But no statutory or regulatory provision requires that taxpayers be afforded an unlimited opportunity to supplement the administrative record. Roman v. Commissioner, T.C. Memo. 2004-20. The statute requires only that a taxpayer be given a reasonable chance to be heard before the issuance of a notice of determination. Id. We conclude that the settlement officer did not abuse his discretion in sustaining the proposed levy where petitioner only attempted to raise the underlying liability and failed to propose collection alternatives or to provide requested delinquent returns or complete financial information.

Conclusion

On the basis of the motion for summary judgment and the documents provided by respondent in the motion for summary judgment and the declaration and the presentations of the parties, the Court finds that there are no material facts in dispute and that respondent is entitled to summary judgment as a matter of law.

(Whereupon, at 9:37 a.m., the above-entitled matter was concluded.)